IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 495 of 1999

in

SPECIAL CIVIL APPLICATIONNo 6512 of 1997

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE J.M.PANCHAL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VITHTHALBHAI P PATEL

Versus

BARODA MUNICIPAL CORPORATION

Appearance:

MR NR SHAHANI for Appellant

MR PRANAV G DESAI for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE J.M.PANCHAL

Date of decision: 11/07/2000

CAV JUDGEMENT

Per Panchal, J:

This appeal which is filed under Clause 15 of the Letters Patent is directed against judgment dated March 19, 1999 rendered by the learned Single Judge in SCA No. 6512 of 1997 by which the award dated January 27, 1997 made by the Labour court, Vadodara directing the respondent corporation to reinstate the appellant in service with 25% back wages is set aside.

The respondent is a Corporation constituted under the provisions of the Bombay Provincial Municipal Corporations ASsct,1949 .It had employed one Mr A.C.Patel as attendant , Sardar Bag Guest House, Vadodara which is under Parks and Gardens Department of the Corporation. Said Mr.Patel was suspended from service and,therefore, it became necessary for the respondent corporation to fill up the said vacancy as as a stop gap arrangement. Accordingly, the appellant, by way of stop gap arrangement was appointed as attendant of Sardar Bag Guest House. In the order of appointment, it was specifically mentioned that appointment of the appellant was by way of stop gap arrangement and he would be deemed to have been discharged from services on expiry of the period mentioned in the appointment order. Suspension of Mr. Patel continued and,therefore, successive appointment orders were given to the appellant. Ultimately, one Laxmanbhai Manilal Parmar discharging duties as attendant at Lal Bag Guest House, Vadodara was transferred to Sardar Bag Guest House,Vadodara by an order dated June 5, 1997 in place of Mr. A.C.Patel who was suspended and services of the appellant were terminated. The appellant raised a dispute regarding termination of his services which was referred to the Labour court,Vadodara for adjudication. The labour court, vide award dated January 27, 1997 directed the respondent corporation to reinstate the appellant in service with 25% back wages. The said award was challenged by the respondent corporation before the High Court in SCA No. 6512 of 1999. Learned Single Judge took the view that termination of services of the appellant was as a result of non-renewal of contract of employment between the appellant and the respondent on its expiry and the contract was terminated under a stipulation in that behalf contained therein. According to the learned Single Judge, provisions of section 2 (oo)

(bb) of the Industrial Disputes Act,1947 (`the Act' for short) were applicable to the facts of the present case. In view of these conclusions, learned Single Judge allowed the petition and set aside the award of the Labour court by the impugned judgment giving rise to the present appeal.

Mr.N.R. Shahni, learned counsel for the appellant submitted that Mr.A.C.Patel who was suspended and in whose vacancy , the appellant was appointed, had not returned to rejoin his duties and,therefore,provisions of section 2 (oo)(bb) of the Act were not applicable to the facts of the present case. It was claimed that Laxmanbhai Manilal Parmar who was transferred from another Guest House was junior to the appellant and, therefore, services of the appellant could not have been terminated in violation of section 25G of the Act. What was emphasised on behalf of the appellant was that cadre of 11 employees working in different Guest Houses of the respondent corporation as attendants could not have been reduced in strength by giving work to six Majdoors and,therefore, provisions of section 2 (oo) (bb) could not have been pressed into service by the respondent corporation. It was pleaded that interpretation of section 2 (oo) (bb) placed by the learned Single Judge is erroneous and, therefore, the appeal should be accepted. In support of his submissions, learned counsel for the appellant rleied on the decisions rendered in (1) Balbir Singh vs. Kurukshtre Central Co-operative Bank Ltd.and another 1990 (1) LLJ, 443; (2) D.H.Shirkey and others vs.Zilla Parishad,Yavatmal and others, 1990 (1) LLJ, 445; (3)Vadodara Municipal Corporation vs. Gajendra R.Dhumal, 1996 (1) LLJ, 206.

Mr P.G.Desai,learned counsel for the respondent corporation submitted that termination of service of the appellant was as a result of non-renewal of contract of employment between the employer and the appellant concerned on its expiry and as the contract was terminated under stipulation in that behalf contained therein, the appeal should be dismissed.

We have heard the learned counsel for the parties and taken into consideration the award of the Labour court as well as additional grounds raised by the appellant in the draft amendment and additional affidavit which is filed by the appellant.

From the successive appointment orders, it is evident that appointment of the appellant was for a fixed term and by way of stop gap arrangement. The appointment was

against temporary vacancy caused by the suspension of a permanent employee. In our view, termination of services of an employee who is appointed against such temporary vacancy would not amount to retrenchment within the meaning of section 2(oo) of the Act. The record of the case shows that a vacancy had arisen temporarily against which regularly appointed employee was posted by transfer and therefore, termination of services of the appellant cannot be considered as his termination from service. Each successive appointment order was given to the appellant with specific condition that he was appointed not against any permanent vacancy but to discharge duties on a post held by Mr.. A.C.Patel who was suspended from service. Keeping in view the fact that there was indefiniteness in the period of suspension, at different times, appointment was made for a fixed term. This methodology in itself, on the facts and in the circumstances of the case, would not give rise to any presumption that successive fixed term appointments were given with a mala fide intention to deprive the appellant of any lawful claim. It is not the case of the appellant that he was ever appointed in a regular manner against a regular vacancy. Under the circumstances, we are of the opinion that the learned Single judge was right in holding that termination of service of the appellant does not fall within the purview of retrenchment in view of provisions of Section 2 (oo) (bb) of the Act. The act of transferring Laxmanbhai Manilal Parmar to Sardar Bag Guest House and posting him as attendant vice Mr. A.C.Patel who was suspended from service cannot be regarded as a mala fide action. There is no material on record to draw an inference of any malice in the present case.

In Balbir Singh (supra), a learned Single Judge of the Punjab and Haryana High Court has ruled that amended provisions of Section 2 (oo) (bb) should not be so construed as to drastically restrict the orbit of term `retrenchment' and clause (bb) being exception, must be interpreted narrowly. It has been further ruled in the said decision that clause (bb) cannot be given meanings which nullify or curtail the ambit of the principal clause and there is nothing in this clause which allows an outlet to unscrupulous employers to shunt out workers in the garb of non-renewal of contract even when the work subsists.

In Shirkey (supra), what is laid down is that letter of appointment providing fixed tenure cannot be the sole basis to determine whether sub-clause (bb) of section 2 (oo) is attracted. According to this decision, nature of

employment, nature of duties and type of job should be considered before applying provisions of section 2(oo) (bb) to the facts of a particular case.

In Vadodara Municipal Corporation (supra), it has been held by the learned Single judge of this Court that if on expiry of fixed term, a workman is continued in service, section 2(oo) (bb) of the Act will not be attracted.

In our considered view, the authorities cited at the Bar by the learned counsel for the appellant do not help the case of the appellant. As observed earlier,there is nothing on record to show that the order terminating services of the appellant was passed by the respondent corporation to shunt out appointment in the garb of non-renewal of contract. It had become necessary for the respondent corporation to fill up the vacancy by stop gap arrangement because of suspension of Mr.A.C.Patel and,therefore, the appellant was appointed on the post which was held by Mr.Patel temporarily and for specified time. In view of indefiniteness in the period of suspension, the appointment was renewed by contract wherein it was specifically stipulated that appointment was (1)for fixed term; (2) by way of stop gap arrangement and (3) the service was to stand terminated on the expiry of period specified.

In M.Venugopal vs. Divisional Manager, LIC of India, Machilipatnam, AIR 1994 SC, 1343, services of a probationer were terminated without giving any notice in terms of the contract of employment read with Regulation No.14 on the ground that he had failed to achieve the target stipulated in the contract within the extended period of probation. The Supreme court has held that termination of services of the appellant was not retrenchment within the meaning of Section 2 (oo) as it was covered by exemption clause 2 (bb) of the Act.

In Escorts Limited vs. Presiding Officer and another, (1997) 11 SCC 521, respondent No.2 was temporarily appointed for a specified period of two months and the terms of appointment enabled the employer to terminate services at any stage without assigning any reason.Termination of service was effected before expiry of the specified period.The Supreme court, after considering different provisions of the Act has held that as the appointment was for a specified period and terms of appointment enabled the employer to terminate the service at any stage without assigning any reason, termination did not amount to retrenchment and provisions of sections 25F and 25G were not attracted.

Again in State of Rajasthan vs. Rameshwar Lal Gahlot, (1996) 1 SCC 595, the respondent was appointed for a period of three months or till regularly selected candidate was to resume office. He was appointed on January 28,1988 and his appointment came to be terminated on November 19, 1988. Termination was challenged by the respondent before the High court by way of filing a petition. When the writ petition was filed,it was found that respondent had completed more than 240 days .Learned Single judge,therefore, held that termination was in violation of section 25F of the Act and directed the appellant to make fresh appointment of the respondent. Appeal was filed against the latter part of the order and the Division Bench set aside the latter part of the order but directed reinstatement of the respondent in service with back wages. As against the order altered by the Division bench, an appeal was filed before the Supreme court .The Supreme court has held that as the period was for a specified period and services were terminated before expiry of such period, the case would be governed by provisions of Section 2 (oo) (bb) of the Act and unless the action is found to be mala fide or in colourable exercise of power, neither fresh appointment nor reinstatement, can be granted .

In Allahabad Bank vs. Prem Singh, (1996) 10 SCC 597, temporary appointments under different dates for one day or two , making a total of four days was made. In each appointment letter, it was stipulated that appointment was purely temporary for a period specified therein and was terminable automatically thereafter. In such circumstances, the Supreme court has held that services stood terminated at the end of the period specified in the appointment letter and hence Industrial Tribunal erred in holding that person concerned continued in service with a right to arrears of salary. The Supreme court has further held that there would be automatic termination of services on the expiry of period of contract of service and the provisions of section 2 (oo)(bb) of the Act shall be attracted to such facts.

As noted earlier, in each of the appointment letters, it was stipulated that the appointment of the appellant was temporary for the period specified therein and terminable automatically thereafter. Under the circumstances, applying the principles of law laid down by the Supreme court in the above referred to decisions to the facts of the present case, we find that provisions of section 2 (oo) (bb) would be attracted to the facts of the present

case and termination of services of the appellant could not have been regarded as retrenchment within the meaning of section 2 (oo) of the Act. Thus, we find that no error is committed by the learned Single Judge in setting aside the award passed by the Labour court. Appeal is, therefore, liable to be dismissed .

For the foregoing reasons, the appeal fails and is dismissed, Notice is discharged. No order as to costs.

(D.M. Dharmadhikari, C.J.)

(J. M. Panchal,J.)

parekh